

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 27 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0156-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JONATHON GORDON SPERBERG II,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR94019047

Honorable Craig A. Raymond, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Jonathon G. Sperberg II

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Jonathon Sperberg II seeks review of the trial court's order summarily denying his motion and petition for post-conviction relief. In 1995, Sperberg was convicted of first-degree murder after pleading guilty pursuant to a plea agreement. The trial court sentenced him to life imprisonment "without possibility of parole" for

twenty-five years, followed by a consecutive term of community supervision “equal to one (1) day for every seven (7) days of the sentence imposed.”

¶2 In an earlier petition for post-conviction relief, Sperberg claimed Arizona Department of Corrections (ADOC) records erroneously had reflected he had been sentenced to a prison term of natural life, without the possibility of release at any time. The court construed his petition as a motion for clarification and issued a minute entry correcting his sentence to provide, “The Defendant is sentenced to a term of life imprisonment and shall not be released on any basis until having served 25 calendar years.”¹ According to the minute entry’s distribution list, a copy of the corrected sentence was provided to the ADOC.

¶3 In the spring of 2010, Sperberg, acting in propria persona, filed a motion for reduction of his sentence and a petition to modify his sentence; in both, he asked to be resentenced to a “flat” twenty-five-year term. The trial court regarded Sperberg’s requests as a petition for writ of habeas corpus and summarily denied relief. Sperberg has petitioned this court for review, pursuant to Rule 32, Ariz. R. Crim. P. *See* Ariz. R. Crim. P. 32.3 (Rule 32 procedures govern petition for writ of habeas corpus challenging validity of conviction or sentence). We will not disturb a court’s summary denial of post-conviction relief absent an abuse of the court’s discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¹This correction was consistent with the statute in effect when Sperberg committed the offense, which provided for imposition of either a natural life term of imprisonment, which precluded release “for the remainder of the defendant’s natural life,” or a life sentence that prohibited a defendant’s release “on any basis until the completion of the service of twenty-five calendar years.” 1993 Ariz. Sess. Laws, ch. 153, § 1.

¶4 We find no abuse of discretion here. Sperberg argued below that the sentence he received was disproportionate to sentences imposed on his codefendants and in light of his “relative[ly] minor” participation in the offense. He also appears to have argued the trial court erred in ordering his sentence be served “without possibility of parole for twenty[-]five ye[ars],” even though his offense was committed after January 1, 1994, and he therefore is not among those inmates subject to parole provisions. *See* A.R.S. § 41-1604.09(I) (parole eligibility classification and certification “applies only to persons who commit felony offenses before January 1, 1994”); *State v. Rosario*, 195 Ariz. 264, ¶ 26, 987 P.2d 226, 230 (App. 1999) (Arizona legislature has eliminated possibility of parole for crimes committed after January 1, 1994). Without further explanation, he also maintained he would be “unable” to serve both the prison sentence and the consecutive term of community supervision. Sperberg raises the same arguments on review.

¶5 With respect to Sperberg’s claim that the trial court erred in referring to his eligibility for parole when imposing sentence, this claim was raised in a previous post-conviction relief proceeding, addressed on the merits, and resolved by the court’s minute entry correcting Sperberg’s sentence. It therefore is precluded pursuant to Rule 32.2(a)(2). All other claims challenging the legality of the sentence imposed, *see* Ariz. R. Crim. P. 32.1(c), have been waived by Sperberg’s failure to raise them in his first Rule 32 proceeding and are precluded on that ground. *See* Ariz. R. Crim. P. 32.2(a)(3) (preclusion of claims “waived at trial, on appeal, or in any previous collateral

proceeding”); Ariz. R. Crim. P. 32.2(b) (claims that fall under Rule 32.1(c) subject to preclusion).

¶6 To the extent Sperberg means to dispute the ADOC’s calculation of his release eligibility under Rule 32.1(d), such a claim is not yet cognizable. *See id.* (Rule 32.1(d) applies when “person is being held in custody after the sentence imposed has expired”). As the comment to Rule 32.1(d) explains, although this provision is intended to address miscalculations of a sentence or of “good time” credits, it applies only when the petitioner is claiming he would have been released already, but for the alleged error. Ariz. R. Crim. P. 32.1(d) cmt. Sperberg will remain ineligible for release “on any basis until the completion of the service of twenty-five calendar years” of his prison term, 1993 Ariz. Sess. Laws, ch. 153, § 1, and any claim pursuant to Rule 32.1(d) therefore is premature.

¶7 Sperberg failed to raise a colorable, non-precluded claim under Rule 32, and the trial court did not abuse its discretion in summarily denying relief. Accordingly, although we grant review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge